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December 23, 1998

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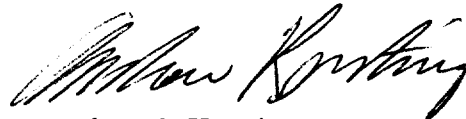
Re: Opposition to Motion to Accept Response  
and Response of Ralph Tyler  
MM Docket No. 98-155  
RM-9082; RM-9133

Dear Ms. Salas:

Transmitted herewith on behalf of Chisholm Trail Broadcasting Co., Inc., licensee of Station KXLS(FM), Alva, Oklahoma, is an original and four copies of its "Opposition to Motion to Accept Response and Response of Ralph Tyler," filed in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with this office.

Very truly yours,  
FLETCHER, HEALD & HILDRETH, P.L.C.



Andrew S. Kersting  
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Enclosure

cc (w/ encl.): Certificate of Service (by hand & first-class mail)  
Mr. Dennis Williams (FCC) (by hand)  
Mr. Glenn Greisman (FCC) (by hand)  
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BEFORE THE

**Federal Communications Commission**

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DEC 23 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 98-155
Table of Allotments,	)	RM-9082
FM Broadcast Stations	)	RM-9133
(Alva, Mooreland, Tishomingo, Tuttle,	)	
and Woodward, Oklahoma)	)	

To: Chief, Allocations Branch

**OPPOSITION TO MOTION TO ACCEPT RESPONSE**  
**AND RESPONSE OF RALPH TYLER**

CHISHOLM TRAIL BROADCASTING CO., INC.

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December 23, 1998

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## **SUMMARY**

As demonstrated herein, Tyler's Response is an unauthorized pleading under Section 1.415 of the Commission's rules, and he has not established good cause for its acceptance. Therefore, Tyler's Motion to Accept Response and accompanying Response should be summarily dismissed.

In the event the Commission elects to consider Tyler's Response on its merits, Tyler's pleading, along with this opposition and Chisholm's November 3, 1998, Reply Comments, establish that the proposed reallocation of Channel 259C3 from Tishomingo to Tuttle, Oklahoma, will not serve the public interest. The record evidence makes clear that Tyler has attempted to mislead the Commission into believing that Station KAZC is an independently viable operating station, when, in fact, KAZC is nothing but a sham. As shown herein, Tyler has provided *all* of KAZC's personnel, programming, and finances, as well as all of its operating equipment and necessary engineering services. In light of Tyler's misrepresentations to the Commission concerning the operation of both KTSH and KAZC, the Commission can have no assurance whatsoever that KAZC will continue to operate if Tyler's proposal is adopted and he no longer has any reason to continue to support the station.

As Tyler acknowledges, his proposal to reallocate Channel 259C3 from Tishomingo to Tuttle is dependent upon the existence of another operating station at Tishomingo. Therefore, because Tyler's attempt to deceive the Commission concerning KAZC goes to the very heart of his reallocation proposal, Tyler's fraud cannot be isolated from the Commission's Section 307(b) determination in this proceeding. The Allocations Branch must address Tyler's attempt to defraud the Commission in making its public interest determination, and, as a result, deny his rulemaking petition.

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 98-155
Table of Allotments,	)	RM-9082
FM Broadcast Stations	)	RM-9133
(Alva, Mooreland, Tishomingo, Tuttle,	)	
and Woodward, Oklahoma)	)	

To: Chief, Allocations Branch

**OPPOSITION TO MOTION TO ACCEPT RESPONSE  
AND RESPONSE OF RALPH TYLER**

Chisholm Trail Broadcasting Co., Inc. ("Chisholm"), licensee of Station KXLS(FM), Alva, Oklahoma, by counsel, hereby opposes the "Motion to Accept Response" ("Motion") and "Response of Ralph Tyler" ("Response"), filed December 14, 1998, by Ralph Tyler ("Tyler") in the above-captioned proceeding. In support of this opposition, the following is stated:

**I. Introduction.**

Tyler's Response is an unauthorized pleading under Section 1.415 of the Commission's rules and he failed to establish good cause for its acceptance. Therefore, Tyler's Motion and accompanying Response should be summarily dismissed without consideration.

In the event the Commission elects to consider Tyler's unauthorized pleading on its merits, Tyler's Response establishes that the proposed reallocation of Channel 259C3 from Tishomingo to Tuttle, Oklahoma, will not serve the public interest. The Allocations Branch cannot permit Tyler to entirely subvert the Commission's allocation process through fraud. Indeed, Tyler's attempt to defraud the Commission goes to the very heart of his reallocation proposal because he has attempted

to mislead the Commission into believing that there is an independently viable operating radio station in Tishomingo, Oklahoma. Unlike other allocation proceedings where the alleged character deficiencies of a petitioner may be regarded as a “licensing matter,” and can be addressed in the normal course through the Commission’s application and licensing processes, in a change-of-community allotment proceeding such as this, the Allocations Branch must address Tyler’s attempt to defraud the Commission because it is inextricably intertwined with the Branch’s Section 307(b) public interest determination.<sup>1</sup>

## **II. Tyler’s Motion to Accept Response Should Be Denied.**

Sections 1.415 and 1.420 of the rules provide for the filing of comments and reply comments. Section 1.415(d) states: “No additional comments may be filed unless specifically requested or authorized by the Commission.” 47 CFR §1.415(d). There is no provision in Section 1.420 of the rules which authorizes the filing of Tyler’s Response. Moreover, Tyler’s Motion does not contain any “good cause” showing concerning why his Response should be considered by the Commission. Therefore, Tyler’s Motion and accompanying Response should be summarily dismissed. However, because of the substantial character allegations raised in Chisholm’s Reply Comments, the Commission should accept the attached declarations of Tyler and Mullinax and consider the statements contained therein in connection with Chisholm’s Reply Comments and this Opposition.

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<sup>1</sup> The text of Tyler’s Response -- which consists of only procedural arguments and *ad hominem* attacks upon Chisholm’s counsel -- reveals the predicament Tyler is in. Tyler’s pleading makes no effort to address the serious character allegations set forth in Chisholm’s Reply Comments. Chisholm’s factual allegations are addressed only in the declarations of Tyler and Mullinax, which are attached to the Response. These declarations are essentially ignored -- and certainly not endorsed -- in the text of Tyler’s pleading.

### **III. The Allocations Branch Cannot Permit Tyler's Fraud to Subvert the Commission's Allocation Process.**

Assuming, *arguendo*, the Commission elects to consider Tyler's Response on its merits despite its procedural deficiencies, Tyler's pleading is entirely without merit. Although Tyler argues that the facts and legal arguments contained in Chisholm's November 3, 1998, Reply Comments are "irrelevant" to the disposition of this proceeding (Response, ¶1), Tyler fails to recognize that his attempt to defraud the Commission *is* relevant to the Commission's public interest determination because the fraud in this case goes to the heart of his reallocation proposal.

#### **A. Mullinax Acted Pursuant to Tyler's Direction and Control.**

Both Tyler's and Mullinax's respective declarations state that Tyler has an agreement with Tyler Media Group, Inc., pursuant to which Mullinax will provide engineering services to Tyler for KTSH.<sup>2</sup> Nevertheless, Tyler's attempt to make Mullinax the scape goat for his misrepresentations to the FCC is not credible.

As shown in Chisholm's Reply Comments, Mullinax completed the engineering portion of the KAZC license application (File No. BLED-981002KA). In doing so, he listed his address as 5105 S. Shields, Oklahoma City, Oklahoma 73129. He also listed his phone number as (405) 616-5500. Mullinax's address and telephone number are the same as that reflected in the letterhead of Tyler's October 1, 1998, letter to the FCC Secretary notifying the Commission that KTSH had

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<sup>2</sup> See Tyler Declaration, ¶3, Mullinax Declaration, ¶2.

suspended program operation.<sup>3</sup> Mr. Mullinax's address also is the same as that listed for Tyler in KTSH's August 20, 1998, license application and station license.<sup>4</sup>

In addition, the 5101 S. Shields address is the same as that of three other Tyler-related entities: Tyler Enterprises, L.L.C., Tyler Broadcasting Corporation, and Tyler Media Group, Inc.<sup>5</sup> Thus, the record establishes that Tyler, Mullinax, and Tyler's sons all work out of the same office at 5105 S. Shields in Oklahoma City.

Based on his declaration, Tyler would have the Commission believe the following:

1. Randy Mullinax, a contract engineer whom Tyler first hired as a station engineer over 20 years ago, whom Tyler has continued to have contact with since that time, and who currently works out of the same building as Tyler, provided Tyler with a two-sentence letter in final form, on Tyler's own letterhead, which stated that KTSH had suspended operation "due to antenna failure."<sup>6</sup>
2. Tyler signed the two-sentence letter without reading it, without any knowledge of its contents, and without discussing the contents of the letter with Mullinax.

Tyler Declaration, ¶5.

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<sup>3</sup> See Chisholm Reply Comments, Attachment C.

<sup>4</sup> See Chisholm Reply Comments, Attachments A & D.

<sup>5</sup> Tyler Enterprises, L.L.C., is the licensee of Station KTUZ(FM), Chickasha, Oklahoma, of which Tyler is the sole owner. Tyler's check in payment of the FCC filing fee for the KTSH license application (File No. BLH-960820KA) was drawn from the account of "Tyler Enterprises." Although the address for Tyler Enterprises is 5105 S. Shields in Oklahoma City, the telephone number listed on the check is (405) 632-6766. That is the same phone number of Tyler Broadcasting Corporation (also at the 5105 S. Shields address), licensee of Stations KKNG(AM)/KTLS(FM), Holdenville, Oklahoma, and KKNG(FM), Newcastle, Oklahoma, which is owned by Tyler's sons. See Chisholm Reply Comments, Attachment A (last page); FCC Form 323, filed March 10, 1998, by Tyler Enterprises, L.L.C.; and FCC Form 323, filed January 20, 1998, by Tyler Broadcasting Corporation. (Official notice requested.)

<sup>6</sup> Mullinax also apparently knew enough to have copies of Tyler's October 1, 1998, letter sent to the KTSH public file and Tyler's FCC counsel. See Chisholm Reply Comments, Attachment C (containing a copy of Tyler's letter).



Tyler's explanation concerning the circumstances surrounding his October 1, 1998, letter to the FCC is, at best, disingenuous. Consistent with Chisholm's allegations (*see* Reply Comments, p. 16), Tyler acknowledged that he was aware of the impending October 19, 1998, comment deadline in this proceeding, and believed that the best way to respond to the Commission's directive in its *NPRM*<sup>7</sup> was to get KAZC on the air "by donating the KTSH transmitter, transmission line, and studio equipment and the engineering services necessary to complete the KAZC installation."<sup>8</sup> Tyler undoubtedly was well aware of the equipment he had at the KTSH transmitter site, and that, if he donated such equipment to KAZC, he would have no equipment with which to operate KTSH. In light of these facts, it simply is not plausible that Mullinax, on his own volition, prepared a letter to the FCC misrepresenting that KTSH was off the air "due to antenna failure," and that Tyler never read the letter or discussed its contents with Mullinax.

Although Tyler's and Mullinax's declarations carefully avoid providing any indication of whether Tyler told Mullinax to take KTSH off the air so KAZC could commence operation, the record clearly establishes that Mullinax acted pursuant to Tyler's instruction.<sup>9</sup> Indeed, where would

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<sup>7</sup> *Notice of Proposed Rule Making and Orders to Show Cause*, DA 98-1682 (released August 28, 1998) ("*NPRM*"). The *NPRM* directed Tyler to:

provide further information demonstrating why the public interest would be served by removing Tishomingo's sole local broadcast service in order to provide a first such service to Tuttle.

*NPRM* at ¶10.

<sup>8</sup> Tyler Declaration, ¶4; *see also* Mullinax Declaration, ¶3.

<sup>9</sup> If Mullinax had a source other than Tyler for his "understanding" concerning the comment deadline in this proceeding, Tyler's intent to donate all of KTSH's operating equipment to KAZC, and that this was to be done "sooner than originally planned" (Mullinax Declaration, (continued...))

a contract engineer such as Mullinax obtain the authority to hire a tower crew to take KTSH off the air solely to put another -- purportedly independent noncommercial station -- on the air? Who, other than Tyler, would have directed Mullinax to re-tune the KTSH transmitter to KAZC's noncommercial frequency? Further, why would Mullinax have Tyler sign a letter which Mullinax knew misrepresented material facts to the Commission, without discussing the letter with Tyler? And why would Mullinax, rather than Tyler, send a copy of the letter to Tyler's FCC counsel?

Furthermore, neither declaration provides any explanation concerning Mullinax's actions with respect to KAZC. Although both Tyler and Mullinax claim that Tyler contracted for Mullinax's services for KTSH through Tyler Media Group, neither declaration suggests that the agreement required Mullinax to provide a false certification to KAZC's license application.

Considered together, the declarations raise a significant and dispositive question: What motive could *Mullinax* possibly have for (i) lying to the Commission concerning the reason that KTSH was off the air; (ii) not advising Tyler that, in signing the October 1, 1998, letter to the FCC, he was misrepresenting facts to the Commission; (iii) lying to an FCC inspector concerning the reason KTSH was off the air, and asking a tower crew and an electronics dealer to verify his lie (Mullinax Declaration, ¶¶6-7); and (iv) lying to the Commission in completing the engineering portion of the KAZC license application? What possible benefit could there be for a contract engineer such as Mullinax to make these misrepresentations to the FCC?

The evidence of record establishes beyond peradventure that, in light of the pending comment deadline in this proceeding, Tyler directed Mullinax to take the necessary steps to take KTSH off

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<sup>9</sup>(...continued)

¶3), the Commission can rest assured that both Tyler and Mullinax would have identified the source of this information in their respective declarations.

the air and get KAZC on the air as soon as possible. Tyler's attempt to have Mullinax take responsibility for Tyler's repeated misrepresentations to the FCC simply does not wash. Indeed, Tyler, as the licensee of KTSH, would be the one to achieve the substantial monetary benefit if KTSH were permitted to move to the Oklahoma City area.

Tyler's description of his telephone conversation with the FCC field inspector also demonstrates that he misrepresented facts to the Commission. Although Tyler's declaration indicates that he has been in the broadcast business for at least 22 years,<sup>10</sup> Tyler claims that the questions the FCC inspector asked during their October 29, 1998, telephone conversation were "technical in nature and [he] did not possess the expertise to be able to answer them." Tyler Declaration, ¶5. Tyler stated that he asked Mullinax to join the conversation. "Mullinax and the FCC inspector then spoke about the technical facilities of KTSH." *Id.* Mullinax recalled that the FCC inspector wanted to know *why KTSH was off the air*. Mullinax Declaration, ¶6 (emphasis added). Considering the manner in which KTSH was taken off the air and KAZC commenced operation, it is highly unlikely that the FCC field inspector's questions concerning "why KTSH was off the air" (Mullinax Declaration, ¶6) could have been so technical in nature that a Commission licensee with over 20 years of broadcast experience could not have answered them. Tyler knew full well why KTSH was off the air, and he also knew that Mullinax had not answered the inspector's questions truthfully. *Compare* Tyler Declaration, ¶5 *with* Mullinax Declaration, ¶6.

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<sup>10</sup> Tyler stated that he first hired Mullinax in 1976 to serve as chief engineer of a station he owned at that time. Mullinax held that position for the entire time (approximately 11 years) that Tyler held a majority interest in that station. After selling that station, Tyler stated that he has "continued to have contact with Randy Mullinax" through his radio tower business. Tyler Declaration, ¶3.

Moreover, although Tyler states that he telephoned his FCC counsel to advise him of the FCC's inspection of KTSH and Mullinax's misrepresentations to the field inspector, Tyler never contacted the FCC's field office to inform the inspector that Mullinax (if not Tyler as well) had lied to him on October 29, 1998. Instead, Tyler waited until over six weeks later, when he served the Dallas field office with a copy of his Response, to inform the FCC inspector that Mullinax had lied to him. Tyler's failure to notify the Commission in a timely manner of his misrepresentations concerning the operation of KTSH -- particularly considering that he was a party to the telephone call -- demonstrates Tyler's willingness to mislead the Commission. Tyler also made no effort to correct the misrepresentation contained in his October 1, 1998, letter to the FCC concerning the reason that KTSH was off the air.

Furthermore, even assuming, *arguendo*, that Tyler did not have prior knowledge of Mullinax's misrepresentations to the Commission until after his October 29, 1998, telephone conversation with the FCC field inspector, neither Tyler nor Mullinax provides any indication that Tyler has fired Mullinax, or whether Mullinax has been reprimanded in any way for his wrongful conduct. Instead, the record strongly suggests that Mullinax, who apparently has been providing engineering services for Tyler and his related-entities for over 20 years, was simply paid to take the blame for Tyler's misrepresentations to the Commission.

Mullinax's declaration also suggests that his actions concerning KTSH and KAZC were taken at Tyler's direction. In attempting to take responsibility for Tyler's October 1, 1998, letter to the FCC, Mullinax stated: "Because one bay of the KTSH antenna was down and the *antenna was not working to specifications*, I wrote that KTSH was off the air due to antenna failure." Mullinax Declaration, ¶5 (emphasis added). Mullinax also stated, however, that he lied to the FCC inspector

concerning the reason that KTSH was off the air in telling him that “the bullet in the lower bay had failed . . . .” *Id.* at ¶6. If it had been true, as Mullinax stated, that the lower bay of the KTSH antenna was not working according to specifications, there would have been no reason to lie to the FCC inspector, nor would there have been any reason to lie to the Commission in Tyler’s October 1, 1998, letter. Mullinax could have told both the FCC in Washington and the field inspector that KTSH was off the air because its antenna was not working according to specifications. Thus, Mullinax’s declaration, which is intended to support Tyler’s claim that he had no knowledge of the contents of his October 1, 1998, letter to the FCC, is inherently inconsistent.

Furthermore, although Mullinax claims that he “panicked and perpetuated a false statement” by lying to the FCC field inspector and asking the tower crew and electronics dealer to confirm his story (Mullinax Declaration, ¶¶6-8), Mullinax’s explanation concerning his lie to the FCC field inspector is a complete fabrication. Mullinax did not “panic” in telling the field inspector that a bullet had failed in the lower bay because his statement to the FCC field inspector on October 29, 1998, was consistent with Tyler’s representation to the FCC four weeks earlier in his October 1, 1998, letter stating that KTSH had suffered “antenna failure.” Mullinax’s lie to the FCC inspector also is consistent with Tina Smith’s statement to William Nolan (during his October 30, 1998, inspection of the KTSH/KAZC transmitter site and studio) that Mullinax had told her that KTSH had suffered “antenna damage.”<sup>11</sup> Therefore, although Mullinax claims that his statements to the FCC field inspector on October 29, 1998, were made spontaneously and due to “panic” on his part,

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<sup>11</sup> See Chisholm Reply Comments, Attachment E, p. 6. Mr. Nolan’s conversation with Ms. Smith occurred less than 24 hours after Mullinax’s telephone conversation with the FCC field inspector.

the record reflects that his statements were made deliberately and were part of a scheme to lie to the Commission which began at least one month earlier when KTSH was taken off the air.

Finally, although Mullinax claims that it is only in this “one instance” that he “failed to exercise good judgment” (Mullinax Declaration, ¶8), his declaration fails to inform the Commission that he also falsely certified KAZC’s license application.<sup>12</sup> Therefore, because Mullinax’s declaration is intended to support Tyler’s, and is riddled with inconsistencies, Tyler’s attempt to have Mullinax take the fall for his misrepresentations to the Commission should be entirely discredited.

B. The Allocations Branch Cannot Make a Public Interest Determination Regarding the Proposed Reallotment of Channel 259C3 Without Addressing Tyler’s Fraud.

As demonstrated herein as well as in Chisholm’s Reply Comments, Tyler’s fraud goes to the very heart of his reallotment proposal because, as Tyler acknowledges (Tyler Declaration, ¶4), his proposal to move KTSH to the Oklahoma City area has always been dependent upon the existence of a replacement station at Tishomingo. Unlike other allocation proceedings, where the alleged character deficiencies of a rulemaking petitioner can be regarded as a “licensing matter,” and can be addressed in the normal course through the Commission’s application and licensing procedures,<sup>13</sup> in a proceeding such as this, where the petitioner seeks to change a station’s community of license,

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<sup>12</sup> In his supporting engineering statement attached to Tyler’s Response, William G. Brown takes issue with Mr. Nolan’s statements concerning the beam tilt of KAZC’s single-bay antenna. Mr. Brown’s argument misses its mark. He and Tyler fail to recognize that the important fact is that Mullinax certified in the KAZC license application that the single-bay antenna was mounted with its center of radiation at 76.93 meters --which it clearly is not -- and with *no* beam tilt.

<sup>13</sup> See, e.g., *Camp Lejeune, North Carolina*, 43 RR 2d 900 (Chief, Broadcast Bur. 1978) (noting that allegations concerning the petitioner’s proposed religious format and character were not properly raised in an FM drop-in proceeding).

Tyler's attempt to defraud the Commission must be addressed before the Allocations Branch can make a public interest determination regarding the proposed reallocation of Channel 259C3. Indeed, this is not a case where the Section 307(b) determination can be neatly isolated from Tyler's fraud. Moreover, if the Allocations Branch were to grant Tyler's reallocation proposal despite his fraud, this would constitute a dangerous precedent for the Commission because it would signal all other potential rulemaking petitioners that they can obtain a grant of their proposal by defrauding the Commission -- and thereby entirely subvert the Commission's allocation process -- even where the fraud forms the very basis of the petitioner's allocation proposal.

In this case, the very existence of the station which purportedly will constitute the replacement service at Tishomingo is Tyler's machination. He admittedly is the sole source of KAZC's personnel, programming, and finances. Tyler also has provided *all* of KAZC's operating equipment, including its transmitter, transmission line, antenna, studio equipment, and all necessary engineering services. Through Mullinax, Tyler also controlled the filing of KAZC's pending license application.

The record in this proceeding establishes that Tyler is the real-party-in-interest and/or has assumed control of every aspect of KAZC's operation without prior FCC consent.<sup>14</sup> In reviewing Tyler's proposal, the Allocations Branch must ask itself the following question: If Tyler was willing to go so far as to (i) take KTSH off the air in order to show the Commission that KAZC had commenced operations, (ii) lie to the Commission concerning the reason that KTSH had "temporarily suspended operations", (iii) direct his engineer to falsely certify that KAZC was

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<sup>14</sup> See generally *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981) (indicia used to determine whether an unauthorized transfer of control has occurred are control of a station's policies concerning station finances, personnel matters, and programming).

operating in accordance with its construction permit when it clearly was not, and (iv) have his engineer lie to an FCC inspector regarding the reason that KTSH was off the air, and ask a tower crew and an equipment dealer to confirm his false story; what assurances can the Commission have that KAZC will continue as a viable, operating station (*i.e.*, constitute a meaningful replacement service at Tishomingo) if Channel 259C3 were to be reallocated to Tuttle? Indeed, if the proposed reallocation were to be adopted, what motive would Tyler possibly have to continue providing the personnel, programming, technical equipment, engineering services, and all the necessary finances to ensure that KAZC continues to operate and serve the needs and interests of the Tishomingo community? The record in this proceeding establishes that the Commission can have no such assurance whatsoever. Therefore, because Tyler has attempted to mislead the Commission into believing that KAZC is an independently viable station, and his proposal would effectively result in the removal of Tishomingo's sole local service, Tyler's rulemaking petition must be denied.

**IV. The Procedural Arguments Contained in Tyler's Response Are Without Merit and Lack Any Factual Basis.**

In his Response, Tyler makes a series of procedural arguments regarding Chisholm's Reply Comments and *ad hominem* attacks upon Chisholm's FCC counsel. Nevertheless, as demonstrated herein, Chisholm acted diligently in discovering the facts regarding Tyler's attempt to defraud the Commission. Moreover, although Chisholm's Reply Comments contain serious character allegations, Chisholm merely alleged that Tyler made the same factual misrepresentations to the FCC that are reflected in the declarations of Tyler and Mullinax.



A. Chisholm Acted Diligently in Discovering Tyler's Attempt to Defraud the Commission.

Tyler claims that Chisholm's Reply Comments should be summarily dismissed because the reply pleading contains "wholly new and previously unasserted allegations of fact which, in the exercise of ordinary diligence, should have been contained in its original comments." Response, ¶7. Despite Tyler's allegations, Chisholm acted diligently in discovering Tyler's fraud and promptly brought this matter to the Commission's attention in its November 3, 1998, Reply Comments.

The *NPRM* (at ¶¶14-15) in this proceeding directed Chisholm to show cause why its license should not be modified to specify operation on Channel 260C1 on or before the comment deadline of October 19, 1998. The Commission did not direct Chisholm to monitor the operation of either KTSH or KAZC, nor did Chisholm otherwise have any independent duty to monitor either station. Consistent with its practice, the Commission did not provide public notice of the fact that KTSH suspended operations on September 28, 1998, or that KAZC had commenced program tests on September 29, 1998.

Tyler failed to provide any authority for its suggestion that Chisholm should have made routine status inquiries at the FCC concerning the operation of KTSH. Indeed, Tyler himself apparently believes that the operation of KTSH is not relevant to this proceeding because, despite taking KTSH off the air on September 28, 1998, so KAZC could commence program tests, Tyler's October 19, 1998, Comments failed to make any reference to the fact that KTSH had been off the air for nearly three weeks.

It was not until the filing of Tyler's Comments on October 19, 1998, that Chisholm had notice that KAZC had commenced operation.<sup>15</sup> Upon discussing those comments with its consulting engineer, Chisholm became suspicious of the operation of Stations KTSH and KAZC. Mr. Nolan believed it was unlikely that both stations were operating simultaneously from the same height on the same tower (as proposed in South Central's construction permit application) because of the need to install expensive notch filtering devices and other necessary equipment to prevent the stations from interfering with one another.<sup>16</sup> It was at that time that Chisholm elected to have Mr. Nolan make the four-hour trip from his office in Wichita, Kansas, to the KTSH/KAZC tower site near Tishomingo, Oklahoma, which is approximately 285 miles away. After visiting the tower site and discovering that KTSH had been taken off the air, Mr. Nolan made a *second trip* to Tishomingo in order to gain access to the site,<sup>17</sup> inspect the stations' public files, and take photographs of the tower structure.

Furthermore, the allegations contained in Chisholm's Reply Comments concerning the operation of Stations KTSH and KAZC are directly responsive to Tyler's October 19, 1998,

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<sup>15</sup> Although South Central filed a license application for KAZC on October 2, 1998, the Commission did not issue a Public Notice announcing the filing of this application until October 20, 1998, which was after the comment deadline in this proceeding. *See Public Notice*, Report No. 24350 (released October 20, 1998); *see also* Supplement to Comments of Ralph Tyler, filed October 21, 1998 (attaching a copy of the Public Notice). It was not unreasonable for Chisholm to rely upon an FCC Public Notice announcing the filing of a license application for KAZC to put Chisholm on notice that KAZC had commenced program tests.

<sup>16</sup> *See* Chisholm Reply Comments, Attachment E, p. 6.

<sup>17</sup> As indicated in Mr. Nolan's statement, during his visits to the KTSH/KAZC transmitter site on both October 24 and October 28, 1998, the gate at the highway was locked, and access to the main studio was restricted. *See* Chisholm Reply Comments, Attachment E, pp. 3-4.

Comments. As stated above, although the *NPRM* directed Tyler to show cause why removing Tishomingo's only local radio station and moving it to Tuttle would serve the public interest, the only public interest justification Tyler offered was that KAZC had commenced operation. Chisholm's Reply Comments were directly responsive to that allegation, and provided a detailed account of the facts and circumstances concerning the operation of KAZC. Therefore, there is no basis for Tyler's claim that Chisholm lacked diligence, and that its allegations regarding the operation of KTSH and KAZC should have been included in Chisholm's Comments.

B. Chisholm's Argument Regarding Tyler's Noncompliance With Section 1.420(i) of the Commission's Rules Was Not Untimely.

Tyler also claims that Chisholm's argument alleging that his proposal does not comply with Section 1.420(i) of the rules should have been made in Chisholm's Comments, and not its Reply Comments. Response, p. 5, ¶8. Tyler fails to recognize, however, that the reason Chisholm did not bring this matter to the Commission's attention earlier is because Chisholm was not aware of Tyler's fraud at the time of filing its October 19, 1998, Comments.<sup>18</sup>

Chisholm has always been aware that the only means by which the proposed reallocation at Tuttle could be considered mutually exclusive with the existing allotment at Tishomingo is by (i) Tyler's preferred transmitter site at Tuttle;<sup>19</sup> and (ii) the KTSH construction permit site. However,

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<sup>18</sup> In its *NPRM* (at ¶4), the Commission acknowledged Tyler's representation that his proposal complied with the requirements of Section 1.420(i) of the rules, but it never addressed the issue of whether the proposed reallocation of Channel 259C3 to Tuttle was, in fact, mutually exclusive with the existing Channel 259C3 allotment at Tishomingo.

<sup>19</sup> As noted in Chisholm's Reply Comments, Tishomingo and Tuttle are separated by a distance of 153.59 km (95.43 miles). Reply Comments, p. 18 (citing Attachment F, p. 3). Thus, the center-city reference coordinates of the two communities meet the minimum distance separation requirements of Section 73.207(b). Although Tyler selected a transmitter site for his

(continued...)

it was not until after Chisholm conducted its investigation of the KTSH/KAZC transmitter site and discovered Tyler's misrepresentations to the Commission concerning the operation of KTSH that Chisholm realized Tyler's entire proposal has been a fraud from the outset, including his construction permit application. Despite the filing of Tyler's construction permit application for KTSH, and having the Commission expend its limited resources processing that application, Tyler never intended to construct KTSH's modified facility. That application was filed for the sole purpose of attempting to establish mutual exclusivity with the proposed reallocation of Channel 259C3 at Tuttle.

As demonstrated in the attached declaration of Finis and Ron Hallmark,<sup>20</sup> although Tyler's construction permit for KTSH was granted on August 26, 1997 (File No. BPH-970220IA), Tyler has not had any contact with the site owner since prior to the filing of his application in February 1997. Tyler also has made no effort to commence construction at the KTSH construction permit site. On December 10, 1998, Finis Hallmark telephoned Tyler in an effort to find out whether Tyler intended to construct a tower on his son's property. During their conversation, Tyler made yet another misrepresentation in this proceeding by telling Finis Hallmark that he "*would not have FCC*

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<sup>19</sup>(...continued)

proposed reallocation which is short-spaced to the existing allocation at Tishomingo, there is an area consisting of *over 50 square kilometers* to the north and west of Tuttle in which a site could be located that would be fully-spaced to the existing Channel 259C3 allocation at Tishomingo. Thus, Channel 259C3 could be allotted to Tuttle with a minor site restriction of only 2.34 km to the northwest of Tuttle, without disturbing the existing Channel 259C3 allocation at Tishomingo. Chisholm Reply Comments, p. 18 (citing Attachment F, p. 4 and Ex. 3).

<sup>20</sup> Ron Hallmark is the owner of the property specified in Tyler's modification application for the new KTSH tower site. Finis Hallmark is Ron Hallmark's father. See Exhibit A hereto.

*approval to build a tower on Ron Hallmark's property until March or April, 1999.”<sup>21</sup> See Exhibit A (emphasis added). Therefore, although the KTSH construction permit site would have created the requisite mutual exclusivity with the proposed reallocation of Channel 259C3 at Tuttle, because the permit site is merely a further example of Tyler's effort to defraud the Commission, the Allocations Branch should disregard the KTSH construction permit site and find that Tyler has failed to establish that the proposed reallocation is mutually exclusive with the existing allotment of Channel 259C3 at Tishomingo.*

C. Tyler's Challenge to Chisholm's "Supplement to Reply Comments" is Without Merit.

Tyler makes a series of arguments regarding Chisholm's effort to obtain a copy of Tyler's October 27, 1998, letter to the FCC in which Tyler requested authority for KTSH to remain silent for an additional 90 days "pending the installation of new equipment." Specifically, Tyler states that "Chisholm Trail provides no explanation why its consultant did not photograph the October 27, 1998 letter." Response, ¶15.

Despite Tyler's allegations, Chisholm's consulting engineer, William Nolan, took a photograph of Tyler's October 27, 1998, letter to the FCC ("STA Request") during his October 30, 1998, visit to the KTSH/KAZC studio. Mr. Nolan's photograph of the letter was not complete, however, because portions of the text on the left margin had been cut off. *See Exhibit B hereto.* Mr. Nolan was not able to obtain a photocopy of the letter during his visit to the KTSH studio because there was no photocopy machine on the premises.

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<sup>21</sup> The existing KTSH construction permit is due to expire on February 26, 1999.

As indicated in Chisholm's Reply Comments (p. 4, n.10), Chisholm's counsel had at least two telephone conversations with the FCC's staff in an effort to obtain a copy of Tyler's STA Request which had been filed with the Commission. Shortly after the filing of Chisholm's Reply Comments, Chisholm obtained a copy of the letter from an FCC staff person and promptly supplemented its Reply Comments in order to submit a copy of Tyler's STA Request in this proceeding. Therefore, despite Tyler's allegation, Chisholm was not "dilatory" (Response, ¶17) in obtaining a copy of Tyler's October 27, 1998, STA request and providing a copy of that request to the Allocations Branch.

Tyler also claims that Chisholm's Supplement should be dismissed because it is "scandalous" and lacks "good ground to support it" within the meaning of Section 1.52 of the rules. Response, ¶¶18, 20.

At the time Tyler filed his October 27, 1998, STA request, his representations to the Commission concerning the operation of KTSH were as follows:

This letter is to inform the Federal Communications Commission that *due to antenna failure* on September 28, 1998, the operation of KTSH(FM) has been temporarily suspended.<sup>[22]</sup>

The licensee [of Station KTSH] has suspended operations pending the installation of new equipment. It is presently anticipated that the equipment will be delivered in four to six weeks and that the installation can be completed within sixty days. Authority to remain silent for ninety days is, however, requested to allow for unforeseen circumstances.<sup>[23]</sup>

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<sup>22</sup> Letter from Ralph H. Tyler to Magalie Roman Salas, dated October 1, 1998 (emphasis added). See Chisholm Reply Comments, Attachment C (containing a copy of Tyler's letter).

<sup>23</sup> Letter dated October 27, 1998, from James K. Edmundson, Esquire, to Ms. Magalie R. Salas ("Tyler STA Request").

As demonstrated above, Tyler's October 27, 1998, STA Request, when read in conjunction with his October 1, 1998, letter to the FCC, is ambiguous. Tyler's STA Request made no effort to modify or correct his previous misrepresentation to the Commission that KTSH had suspended operations due to antenna failure, *which Chisholm knew to be false*. Chisholm read Tyler's STA Request with full knowledge that KTSH was *not* off the air "due to antenna failure," and that there was nothing "unforeseen" about KTSH being off the air. Thus, because Tyler's STA Request failed to "fully describe the proposed operation and the necessity for the requested STA," as required by Section 73.1635(a) of the Commission's rules,<sup>24</sup> it was not unreasonable for Chisholm to believe that Tyler's STA Request was intended to perpetuate his earlier misrepresentation to the FCC (*i.e.*, "unforeseen circumstances" referred to the reason KTSH was off the air). When Tyler's STA Request is read in conjunction with his October 1, 1998, letter to the FCC, the phrase, "unforeseen circumstances," takes on an entirely different meaning than that suggested by Tyler.<sup>25</sup>

Furthermore, there can be no dispute that Tyler's STA Request did, in fact, perpetuate his earlier misrepresentation to the Commission. There is nothing in his October 27, 1998, letter to advise the FCC that KTSH did not suffer antenna failure, or that Tyler deliberately took the station off the air so that KAZC could commence operation.

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<sup>24</sup> See 47 CFR §73.1635(a)(2).

<sup>25</sup> Chisholm wishes to make clear that the allegations in its Supplement regarding Tyler's October 27, 1998, letter to the Commission were made with the understanding that Ralph Tyler himself provided that information to the FCC. Chisholm never intended to suggest that such statements had been made by Tyler's FCC counsel on its own. Moreover, Chisholm's Supplement included as an attachment a complete copy of Tyler's October 27, 1998, letter, so that no statement in Tyler's STA Request would be taken out of context.

D. Tyler's Arguments Concerning Chisholm's Opposition to Tyler's "Statement for the Record" Also Are Without Merit.

Tyler claims that Chisholm's "Opposition to Statement for the Record," filed November 25, 1998, should be stricken as "sham and false" within the meaning of Section 1.52 of the rules. After noting that Chisholm objected to Tyler's request to file an unauthorized pleading more than one month after the filing of Chisholm's November 12, 1998, Supplement, Tyler quoted the following statement from Chisholm's opposition pleading:

[T]he only reason Tyler has filed his Statement is that he needs time to fabricate some plausible explanation -- which undoubtedly will involve lining-up witnesses who are under his influence or control -- in order to try and rebut the clear, convincing evidence presented in Chisholm's reply pleadings that Tyler is guilty of fraud and misrepresentation.

Response, ¶¶21, 23 (footnote omitted), citing Chisholm Supplement, p. 4.

Chisholm objected to Tyler's "Statement for the Record" ("Statement") because, as stated in its opposition, Tyler's Statement constitutes nothing more than an extension request to file an unauthorized pleading.<sup>26</sup> Chisholm believed that it was necessary to object to Tyler's extension request so that Chisholm would not be deemed to have consented to the filing of Tyler's forthcoming unauthorized pleading (*i.e.*, Tyler's Motion and Response). Moreover, Tyler had first-hand knowledge of all of the facts that were revealed to the Commission in Chisholm's November 3, 1998, Reply Comments concerning the operation of KTSH. Chisholm found it incomprehensible that Tyler would need nearly six weeks from the date Chisholm's Reply Comments were filed (November 3rd to December 14th) to respond to facts with which Tyler was already well-acquainted and which transpired under his direction in his own backyard.

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<sup>26</sup> See Chisholm Opposition to Statement for the Record, p. 4, n.7.



Furthermore, at the time Tyler filed its Statement on November 18, 1998, Chisholm had become aware of facts which led it to believe that Tyler was engaging in conduct similar to that referenced in paragraph 7 of Mullinax's declaration (*i.e.*, calling the tower crew and equipment dealer and asking them to verify false statements that had been made to the FCC). Chisholm did not want to provide Tyler with nearly six weeks in which to attempt to cover up the wrongdoing that had taken place at KTSH. Although Tyler objects to the above-quoted statement in Chisholm's November 25, 1998, opposition pleading, Tyler's Response -- and particularly Mullinax's declaration -- establish that Chisholm's concerns were warranted. Indeed, Chisholm finds it rather ironic that Tyler vigorously assails Chisholm and its counsel for the character allegations contained in its pleadings in this proceeding, but, at the same time, attaches declarations to his pleading which admit to the fraudulent conduct that Chisholm alleged has taken place.<sup>27</sup>

## **V. Conclusion.**

As demonstrated herein, the proposed reallocation of Channel 259C3 from Tishomingo to Tuttle will not serve the public interest. Tyler has attempted to mislead the Commission into believing that KAZC is an independently viable operating station, when, in fact, KAZC is nothing

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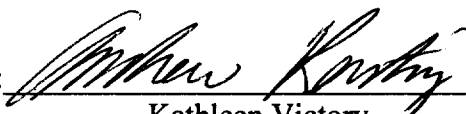
<sup>27</sup> Tyler's claim that Chisholm's Reply Comments should be returned without consideration because Chisholm requested that license revocation proceedings be initiated against KTSH is equally unavailing. The thrust of Chisholm's Reply Comments is that the Allocations Branch cannot permit a rulemaking petitioner to subvert the allocation process through fraud. Chisholm's request that the Commission initiate a license revocation procedure against KTSH reflects its position that the Allocations Branch must address Tyler's fraud in this proceeding and deny his proposal. In the event the Allocations Branch elects not to address the character issues, Chisholm's request was designed to have the Allocations Branch refer the allegations to the appropriate division within the agency before acting on Tyler's proposal. In this regard, Chisholm wishes to advise the Allocations Branch that it has filed an "Informal Objection and Request to Revoke Program Test Authority" against KAZC's pending license application.

but a sham. Therefore, because Tyler's attempt to defraud the Commission goes to the very heart of his reallocation proposal, and his attempt to deceive the Commission cannot be isolated from the Commission's Section 307(b) public interest determination in this proceeding, his rulemaking petition must be denied.

WHEREFORE, in light of the foregoing, Chisholm Trail Broadcasting Co., Inc. respectfully requests that the Motion to Accept Response and the accompanying Response of Ralph Tyler, filed December 14, 1998, be SUMMARILY DISMISSED or DENIED, and that Tyler's proposal to (i) delete Channel 259C3 at Tishomingo, Oklahoma, (ii) allot Channel 259C3 to Tuttle, Oklahoma, (iii) modify the license for Station KTSH, Tishomingo, to specify Tuttle as its community of license, and (iv) modify the license of Station KXLS, Channel 259C1, Alva, Oklahoma, to operate on Channel 260C1, also be DENIED.

Respectfully submitted,

CHISHOLM TRAIL BROADCASTING CO., INC.

By:   
Kathleen Victory  
Andrew S. Kersting

Its Counsel

Fletcher, Heald & Hildreth, P.L.C.  
1300 North Seventeenth Street  
11th Floor  
Arlington, Virginia 22209  
(703) 812-0400

December 23, 1998

## **Exhibit A**

### **Declaration of Finis Hallmark and Ron Hallmark**

**DECLARATION OF FINIS HALLMARK AND RON HALLMARK**

1. We, Finis Hallmark and Ron Hallmark hereby declare and state, under penalty of perjury, the following;
2. Ron Hallmark is the owner of certain property located in Johnston County, Oklahoma that was specified as the proposed transmitter site in an FCC construction permit application (File No. BMPH-970220IA), filed by Ralph Tyler, licensee of Station KTSH (FM), Tishomingo, Oklahoma
3. Finis and Ron Hallmark have not been contacted by Mr. Tyler or his representatives since signing the letter which allowed the use of Ron's property as a tower site for the KTSH (FM) construction permit application on February 11, 1997.
4. On or about December 10, 1998, Finis Hallmark, the father of Ron Hallmark, placed a telephone call to Mr. Tyler to ask him whether he still intended to construct a tower on Ron Hallmark's property. Mr. Tyler told Finis Hallmark that he was having trouble with the FCC, and that he would not have FCC approval to build a tower on Ron Hallmark's property until March or April, 1999.
5. Finis and Ron Hallmark have since been advised that the FCC granted Mr. Tyler's construction permit application (File No. BMPH-970220IA), and that he was issued a construction permit for KTSH's modified facility on August 26, 1997.
6. Finis Hallmark believes that Mr. Tyler was not candid with him in their telephone conversation on or about December 10, 1998, because Mr. Tyler has had approval to construct a new tower on Ron Hallmark's property since August 26, 1997.

Signed and dated this 19 day of December, 1998

  
\_\_\_\_\_  
Ron Hallmark

  
\_\_\_\_\_  
Finis Hallmark

Mr. Ralph H. Tyler  
KTSH Radio  
P O. Box 85  
Tishomingo, OK 73460

It is agreed, that upon approval from the Federal Communications Commission, I will lease or sell to you enough land area to place a communications tower and transmitter building. The acreage shall not exceed three (3) acres total. In addition I will allow egress and ingress. The price will be negotiated at the time of Federal Communications approval.

Date: 2-11-97

Land Owner: Ron Adair  
Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Date: 2-11-97

Ralph H. Tyler  
Ralph H. Tyler  
KTSH Radio  
P. O. Box 85  
Tishomingo, Oklahoma 73460  
Telephone: 405/836-7447

**Exhibit B**

**Copy of Photograph Taken by William Nolan on  
October 30, 1998, of Tyler's October 27, 1998 Letter to the FCC**

October 27, 1998

Mr. R. Salas  
Federal Communications Commission  
Washington, D.C. 20554

Re: KTSH(FM), Tishomingo, Oklahoma

Salas:

My client, Ralph H. Tyler, hereby respectfully requests authority for FM Broadcast Station KTSH, Tishomingo, Oklahoma, to remain silent for a period of ninety days. The licensee has suspended operations pending the installation of new equipment. It is anticipated that the equipment will be delivered in six weeks and that the installation can be completed within ninety days. Authority to remain silent for ninety days is, therefore, requested to allow for unforeseen circumstances.

Please direct inquiries concerning this request to Gary S. Black, Esquire, of this office or to the undersigned.

Sincerely,

James K. Edmundson

**CERTIFICATE OF SERVICE**

I, Crystal McElroy, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 23rd day of December, 1998, copies of the foregoing "Opposition to Motion to Accept Response and Response of Ralph Tyler" were hand delivered or mailed first-class, postage pre-paid, to the following:

John A. Karousos, Chief\*  
Allocations Branch  
Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 565  
Washington, DC 20554

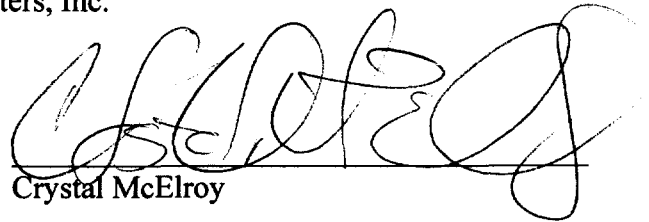
Ms. Leslie K. Shapiro\*  
Allocations Branch  
Policy and Rules Division  
Mass Media Bureau  
Federal Communications Commission  
2000 M Street, N.W., Room 565  
Washington, DC 20554

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Smithwick & Belendiuk, P.C.  
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Counsel for Ralph Tyler

F. Joseph Brinig, Esquire  
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Kathryn R. Schmeltzer, Esquire  
Fisher, Wayland, Cooper, Leader  
& Zaragoza, L.L.P.  
2001 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, DC 20006-1851  
Counsel for FM 92 Broadcasters, Inc.



Crystal McElroy

\* Hand Delivered